NO. 86-2064

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DANNY PIPES AND CHARLES PAYNE,
Petitioners,

v.

STEVE BENNY,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

1. Does the doctrine developed in Parratt v. Taylor preclude coverage under 42 U.S.C. § 1983 of a prisoner's complaint alleging the common law torts of assault and battery?

2. Is a prisoner's complaint alleging relatively minor tortious conduct and no injury sufficient to state a claim under 42 U.S.C. § 1983, after a default judgment is entered?

PARTIES

The parties to the proceedings below were the petitioners Danny Pipes and Charles Payne and the respondent Steve Benny.

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PETITION FOR A WRIT OF CERTIORARI
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The petitioners Danny Pipes and Charles Payne respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Ninth Circuit filed in the above-entitled proceedings on September 5, 1986 and amended on January 16, 1987.

OPINIONS BELOW

The opinion of the Court of Appeals for the Ninth Circuit is reported at 799 F.2d 489, and is reproduced in Appendix A, p. A1.

The judgment of the United States Court District Court for the District of Arizona is reprinted in Appendix C, p. A16.

JURISDICTION

Invoking federal jurisdiction under 42 U.S.C. § 1983, the respondent brought this suit in the United States District Court for the District of Arizona. On October 5, 1984, the district court ordered the entry of a default judgment against petitioners. Judgment was entered on June 20, 1985 and

a timely appeal was taken to the United States Court of Appeals for the Ninth Circuit.

On September 5, 1986, the Ninth Circuit filed a judgment and an opinion affirming the district court. A petition for rehearing and suggestion for rehearing en banc were timely filed and subsequently denied and rejected by the Ninth Circuit on February 9, 1987.

Justice O'Connor has ordered that the time for filing this petition for writ of certiorari be extended to and including June 9, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Eighth Amendment to the United States Constitution:

> Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

Fourteenth Amendment § 1 to the United States Constitution:

> ARTICLE [XIV]
>
> Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Title 42 U.S.C. § 1983:

"Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

STATEMENT OF THE CASE

In March, 1984 respondent, Steve Benny, a prisoner at the Arizona State Penitentiary in Florence, Arizona, instituted this damage action under 42 U.S.C. § 1983 against several prison guards including petitioners Danny Pipes and Charles Payne. The complaint alleged violations under five counts. Count I alleged that petitioners Pipes, Payne, and another guard, Tony Gilbreath, failed to protect Benny from other inmates. (Judgment was ultimately entered in favor of Tony Gilbreath. Consequently, he is no longer a participant in these proceedings.)

Petitioners Pipes and Payne were served with the summons and complaint on March 27, 1984 and March 29, 1984 respectively. Petitioner Pipes was

served by Phillip E. Wolf, a prisoner and convicted felon. Petitioner Payne was served by Jerald E. Lee, another convicted felon and prisoner at Florence. Neither petitioner Pipes nor Payne filed an answer, and on October 5, 1984 the district court ordered entry of default against them. On June 20, 1985, after an evidentiary hearing the district court entered judgment and awarded respondent $2,000 in damages against petitioners Pipes and Payne.

In due course, petitioners Pipes and Payne appealed to the United States Court of Appeals for the Ninth Circuit. Three issues were presented for review:

1. Whether convicted felons serving time in state prisons are "persons" entitled to serve complaints and summons under Rule 4(c)(2)(A), Federal Rules of Civil Procedure.

2. Whether the district court abused its discretion in

refusing to set aside a default which had been entered when no response had been made to a complaint which had been served by convicted felons doing time in Arizona State Prison.

3. Whether, even after entry of efault, the complaint was sufficient to state a claim under 42 U.S.C. § 1983.

Although petitioners do not concede the soundness of those portions of the court of appeals opinion dealing with issues 1 and 2, the focus of this petition is issue 3, discussed on the last page of the opinion.

Petitioners contended in the district court at the default hearing and in the court of appeals that the complaint simply does not contain allegations sufficient to state a claim under 42 U.S.C. § 1983. It's that issue that we present to this Court for review in our petition.

REASONS FOR GRANTING THE WRIT

I

The doctrine developed in Parratt v. Taylor precludes coverage under 42 U.S.C. § 1983 of a prisoner's complaint alleging the common law torts of assault and battery.

In Parratt v. Taylor, 451 U.S. 527 (1981), this Court rejected the notion that every injury to a person or property caused by a state official is a violation of the Fourteenth Amendment.[1/] The Court's concern was that a contrary result "'would make of the Fourteenth Amendment a font of tort law to be

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[1/] The Court had expressed the same reservations a few years earlier in Paul v. Davis, 424 U.S. 693 (1976).

> Respondent, however, has pointed to no specific constitutional guarantee safeguarding the interest he

superimposed upon whatever systems may already be administered by the States.' We do not think that the drafters of the Fourteenth Amendment intended the

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1/(Con't).

> asserts has been invaded.
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> Rather, he apparently believes that the Fourteenth Amendment's Due Process Clause should ex proprio vigore extend to him a right to be free of injury wherever the State may be characterized as the tort feasor. But such a reading would make of the Fourteenth Amendment a font of tort law to be superimposed upon whatever systems may already be administered by the States. We have noted the "constitutional shoals" that confront any attempt to derive from congressional civil rights statutes a body of general federal tort law, Griffin v. Breckenridge, 403 U.S. 88, 101-02, (1971); a fortiori, the procedural guarantees of the Due Process Clause cannot be the source for such law.

Id. at 700-01.

Amendment to play such a role in our society." Parratt, 451 U.S. at 544 (quoting Paul v. Davis, 424 U.S. 693, 701 (1976)). The conversion of common torts into constitutional violations would "trivialize" and "grossly . . . distort the meaning and intent of the Constitution." 451 U.S. at 545 (Stewart, J., concurring). In order to avoid this result the Court held in Parratt that for negligent deprivations of property by state officials, an adequate postdeprivation state tort remedy provides all the process that is due. 451 U.S. at 543-44.

In Hudson v. Palmer, 468 U.S. 517 (1984), the Court extended the Parratt analysis to intentional deprivations of property. 468 U.S. at 545. Both Parratt and Hudson involved state prisoners and state prison officials.

In Parratt, random and unauthorized negligent conduct by prison officials resulted in the loss of a prisoner's hobby kit. 451 U.S. at 530. In Hudson, an unauthorized "shakedown" of a prisoner's cell destroyed some of the prisoner's property. 468 U.S. at 521. In both cases, the existence vel non of a constitutional violation turned on the existence of an adequate state tort remedy. The after-the-fact state tort remedy supplied all of the process that was due. Presently, the Parratt/Hudson rule that postdeprivation state tort remedies satisfy the demands of due process is limited to random and unauthorized[6/] negligent or intentional

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6/ In Logan v. Zimmerman Brush Co., 455 U.S. 422, 436 (1982), this Court emphasized that Parratt applies only to unauthorized acts by state officials and does not apply where a plaintiff is deprived of property under an

deprivations of property. No analytical or historical reason exists, however, for limiting the rule to property deprivations. It should now be extended to alleged deprivations of liberty and other substantive constitutional interests when the misconduct involved amounts to no more than the common law torts of assault and battery. Such an extension is both logical[7/] and overdue.

6/(Con't)

"established state procedure" without adequate predeprivation procedural safeguards.

7/The Fourteenth Amendment's proscriptive language - ". . . nor shall any State deprive any person of life, liberty, or property, without due process of law. . . .", U.S. Const. amend XIV, § 1, - treats all three enumerated interests exactly the same. See Wilson v. Beebe, 770 F.2d 578, 584 (6th Cir. 1985) (Parratt applies to deprivations of liberty interests as well as of property interests.)

During the past decade or more there has been a growing concern that section 1983 litigation is becoming too burdened with ordinary torts. Lip service is given to the concept that not every tort by a state official is a constitutional violation, but the standards for distinguishing one from the other are fuzzy and unintelligible. See Point II. The conflict and confusion in the circuits in this regard has prompted pleas to this Court for guidance. For example, one Circuit Judge recently wrote:

> Sooner or later the Supreme Court will introduce more reason into this area than presently exists. For federal courts to complain about overwork, while busily creating a comprehensive tort system applicable to all forms of misconduct by those acting under the color of state law, is to ask for scornful rejection of their complaint. Either they do not have too much to do or they want to do something other than what they are presently doing. Either

way I cannot blame the public for its indifference.

Gaut v. Sunn, 792 F.2d 874, 876 (9th Cir. 1986) (Sneed, J., concurring).

Judge Sneed also proposed a solution.[8/]

> I suggest that a satisfactory answer would commence with Logan v. Zimmerman Brush Co., 455 U.S. 422, (1982). Thus, the first portion of the answer would be that the Parratt analysis is irrelevant to § 1983 claims based upon an alleged unconstitutional state law, policy, procedure, pattern, or practice.
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> * * *
>
> The second portion of the answer is to extend Parratt to all other constitutional

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8/"My purpose merely is to describe a problem that in my view is fundamental and to suggest an approach that, because of existing precedents, only the Supreme Court can undertake. This is done in full awareness that the effort may be considered presumptuous. It is not intended to be so." Mann v. City of Tucson, 782 F.2d 790, 794 (9th Cir. 1986) (Sneed, J., concurring).

> injuries cognizable under section 1983. This would embrace all unforeseeable deprivations of life, liberty, and property as well as all unplanned violations of 'substantive' due process rights.

Mann v. City of Tucson, 782 F.2d 790, 798 (9th Cir. 1986) (Sneed, J., concurring).

This proposed extension of Parratt would remove thousands of time-consuming, ordinary tort cases from the federal court system.[9/] It would also require a reconsideration of Monroe v. Pape, 365 U.S. 167 (1961).

In Monroe, Justice Douglas stated: "It is no answer that the State has a law which if enforced would give relief. The federal remedy is

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9/For another approach to the problem, see Zagrans, "Under Color of" What Law: A Reconstructed Model of Section 1983 Liability, 71 Va. L. Rev. 499 (1985).

supplementary to the state remedy, and the latter need not be first sought and refused before the federal one is invoked." Id. at 183. Justice Frankfurter argued in dissent that this rule would constitutionalize every act done by a state official. See Monroe, Id. at 240-42. That argument has proven prophetic.

In City of Columbus v. Leonard, 443 U.S. 905 (1979), Justice Rehnquist suggested in dissent that it may be time to reconsider the conclusion in Monroe that "'the federal remedy is supplementary to the state remedy.'" See id. at 910-11. Since then the Court has decided Parratt and Hudson, but without explicit modification of Monroe. Parratt and Hudson, however, represent a substantial dilution of Monroe's supplementary remedy doctrine. As does the earlier case of Ingraham v. Wright,

430 U.S. 651 (1977).

In Ingraham, the Court considered the need for procedural safeguards to protect students from improper corporal punishment in school. The issue was formulated as follows:

> '[T]he question remains what process is due.' Morrissey v. Brewer, [408 U.S. 471] at 481. Were it not for the common-law privilege permitting teachers to inflict reasonable corporal punishment on children in their care, and the availability of the traditional remedies for abuse, the case for requiring advance procedural safeguards would be strong indeed. (Note omitted) But here we deal with a punishment - paddling - within that tradition, and the question is whether the common-law remedies are adequate to afford due process.

Id. at 674-75.

The Court concluded that the availability of civil and criminal sanctions for abuse provided the process that was due for any

violation of the liberty interests involved. Id. at 675-78. By reading Ingraham/Parratt/Hudson together, the impression is gained that random constitutional deprivations involving liberty[10/] or property are withdrawn from section 1983 jurisdiction whenever an adequate state remedy is available.

State courts have always been open in theory to redress constitutional

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10/From Parratt's citation of Ingraham it can be assumed that Parratt extends to intentional deprivations of liberty. See Parratt, 451 U.S. at 542-43.

deprivations,[11/] although the reality of a remedy was sometimes debatable. Today, however, there is no reason to believe that state courts cannot or will not provide adequate remedies for violations of constitutional or other protected rights. In fact, many state courts have expanded state constitutional rights beyond what federal courts have done with the Constitution. See, e.g. Brennan, State Constitutions and the Protection of Individual Rights, 90 Harv. L. Rev. 489 (1977). With the extension of Parratt to liberty interests, state courts will have to assume more of the

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11/"Upon the state courts, equally with the courts of the Union, rests the obligation to guard, enforce, and protect every right granted or secured by the Constitution of the United States . . .." Robb v. Connolly, 111 U.S. 624, 637 (1884).

burden of enforcing the federal rights of their citizens. In so doing, they will resume their constitutional role as "the primary guardians" of our fundamental rights.12/

Petitioners here seek an extension of the Parratt/Hudson doctrine

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12/ "The jurisdiction which Article III of the Constitution conferred on the national judiciary reflected the assumption that the state courts, not the federal courts, would remain the primary guardians of that fundamental security of person and property which the long evolution of the common law as secured to one individual as against other individuals. The Fourteenth Amendment did not alter this basic aspect of our federalism."

Monroe v. Pope, 365 U.S. 167, 237 (1961) (Frankfurter, J., dissenting).

to deprivations of liberty and other substantive constitutional interests. We believe that Parratt and Hudson, together with Ingraham are persuasive precedent for such an extension. In the present case, the alleged "constitutional"[13] deprivations were random and unauthorized, and adequate remedies were available under the laws of the State of Arizona to provide full redress.[14] Federal courts should not be burdened with having

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[12](Con't.)

[13]Respondent's complaint alleges two wrongful acts. They are not called constitutional deprivations in the complaint nor do they appear serious enough to be classified as such. See Point II.

[14]Arizona provides both civil and criminal sanctions for wrongful conduct against prisoners. See e.g., Bell v. State of Arizona, 143 Ariz. 305, 693 P.2d 960 (Ariz. App. 1984) and Ariz. Rev. Stat. Ann. § 31-127 (1978).

to decide which torts by state officials are constitutional deprivations and which are not. Simple torts committed by prison officials upon prisoners simply don't implicate the Constitution. This Court has hinted in previous opinions that torts don't become constitutional violations merely because the tortfeasor is a state official.[15/]

15/ The Fourteenth Amendment does not protect against all deprivations of liberty. It protects only against deprivations of liberty accomplished 'without due process of law.'

* * *

We submit that the time is now ripe for an unequivocal pronouncement in this respect that will finally free the federal judiciary from the morass of tort litigation being thrust upon it in the name of section 1983.

15/ (Con't).

> Section 1983 imposes liability for violations of rights protected by the Constitution, not for violations of duties of care arising out of tort law. Remedy for the latter type of injury must be sought in state court under traditional tort-law principles. Just as '[m]edical malpractice does not become a constitutional violation merely because the victim is a prisoner,' Estelle v. Gamble, 429 U.S. 97, 106 (1976), false imprisonment does not become a violation of the Fourteenth Amendment merely because the defendant is a state official.
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> Baker v. McCollan, 443 U.S. 137, 145-46 (1979).

II

> A prisoner's complaint, alleging relatively minor tortious conduct and no injury, is insufficient to state a claim under 42 U.S.C. § 1983, even after a default judgement is entered thereon.

The frustration felt by federal courts as they struggle to identify and catalog the class of wrongs cognizable under 42 U.S.C. § 1983 is expressed well in the following opening paragraph from the opinion in Jackson v. City of Joliet, 715 F.2d 1200, 1201 (7th Cir. 1983), cert. denied, 465 U.S. 1049 (1984):

> No problem so perplexes the federal courts today as determining the outer bounds of section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983, the ubiquitous tort remedy for deprivations of rights secured by federal law (primarily the Fourteenth Amendment) by persons acting under color of state law.

15/ (Con't).

See also Martinez v. California, 444 U.S. 297, 285 (1980) ("not every injury in which a state official has played some part is actionable under [§ 1983]").

The complaint in the present case alleges conduct far outside those outer bounds. Although a default judgment was entered against petitioners on that complaint, petitioners are not bound by facts which are not well pleaded and are entitled to contest the sufficiency of the complaint on appeal. See Thomson v. Wooster, 114 U.S. 104 (1885) and Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978).

Respondent's complaint alleges two separate incidents of wrongful conduct on the part of petitioners: (1) an assault upon him by petitioner Pipes and (2) the failure of petitioners Pipes and Payne to protect him from other prisoners. The panel of the court of appeals concluded that the allegations of the complaint were sufficient to state a cause of action against petitioners under § 1983. It read the complaint as alleging violations of respondent's

substantive due process rights[16/] as well as his rights under the Eighth Amendment.

16/The panel obviously ignored this Court's instruction in Whitley v. Albers, _____ U.S. _____, 106 S.Ct. 1078, 1088 (1986), that "the Due Process Clause affords [prison inmates] no greater protection than does the Cruel and Unusual Punishment Clause."

A. <u>The substantive due process claim</u>

The first wrongful act alleged in the complaint is an assault upon respondent by petitioner Pipes. The assault is alleged in the complaint in these terms:

> One of the administrative segregation prisoners made a threatening gesture with his fist to hit Steve Benny and the fight was on. Steve Benny was holding his own until CSO Danny Pipes raised the iron panel crank that is used to open and clsoe [sic] the cell doors, and swung it at Steve Benny, which caused Steve Benny to back up in order to not be hit by the iron crank.
>
> CSO Danny Pipes held the iron bar above his head in a striking position towards Steve Benny's head while hand cuffing [sic] him and used abusive force as he (Pipes) removed Steve Benny from the able run area.

Appendix E at p A25-A27.

At best, the above-quoted language states a cause of action for tortious

conduct.[17] Respondent's remedy, if any, for this tort should have been pursued in state court. See Point I. The Ninth Circuit, however, considers this conduct sufficient to trigger a federal tort action under section 1983. Their holding in this respect conflicts with decisions of this Court, e.g., Ingraham v. Wright, supra, and Baker v. McCollan, supra, as well as with decisions from several courts of appeals.[18]

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[17] A tort to be actionable requires injury. In its judgment the district court ruled that petitioner Pipe's conduct in the alleged incident did not cause any injury to respondent.

> Plaintiff's complaint is based upon two incidents. In one he was fighting with another prisoner. The defendant Pipes broke up the fight. There was no evidence that Pipes did anything to cause injury to plaintiff.
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> Appendix C at p. A17.

The other incident of wrongful conduct alleged in respondent's complaint is that petitioners failed to protect respondent from being assaulted by fellow prisoners. That allegation is contained in the following quotation taken from the complaint:

> While Steve Benny was on deadlock on George run, CSO Pipes, CSO Payne and CSO Gilbreath joined in concert and conspired together and placed Steve Benny in the same exercise cage in front of Able Run where the same prisoners had attacked Steve Benny. They (prisoners) would throw urine on Steve Benny and tow [sic] occasions, CSO Pipes and CSO Payne stood by and let one Administrative Segregation prionser [sic] kick Steve Benny and the other hit him in the face with their fist. This occurred during the week of February 6, 1984 and CSO Payne stated to CSO Pipes with his sick laughter 'that's good for the boy!'

Appendix E at p. A27-A28.

18/ See, e.g., Ware v. Reed, 709 F.2d 345 (5th Cir. 1983); Gumz v. Morrissette, 772 F.2d 1395 (1985); and Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983).

The panel characterized the petitioners' action, or rather inaction, as "a malicious failure to intervene." Appendix A at p. 12. It also stated that "the guards deliberately stood aside while he was assaulted by other prisoners" and that petitioners' actions were "intentional, not negligent". Appendix A at p. 12. The panel thus supplied the magic words for removing the complaint from the rules announced in Daniels v. Williams, _____ U.S. _____, 106 S.Ct. 662 (1986), and Davidson v. Cannon, _____ U.S. _____, 106 S.Ct. 668 (1986). The complaint, however, contains none of these words. The comment from one petitioner to another that "that's good for the boy!" doesn't make their inaction intentional or malicious, without more, even when accompanied by "sick laughter." How the petitioners

"stood by" is not specified in the complaint. To stand by with knowledge of the assault and with the ability to prevent it and not do so is one thing; to stand by without knowledge of the assault or without the ability to make timely intervention is something else.

The general principles of causation are applicable to constitutional torts brought in the name of section 1983. See Lossman v. Pekarske, 707 F.2d 288 (7th Cir. 1983). The deprivation of a constitutional right requirement in section 1983 implies causation. Petitioners here did not intentionally cause respondent's injuries, if any. The complaint does not allege that petitioners acted knowingly, intentionally, willfully, deliberately, maliciously, or with deliberate

indifference or reckless disregard for respondent's constitutional rights. Nor does the record supply this indispensable element of causation.[19/]

Respondent could not prove a constitutional violation nor did he plead one. His complaint does not allege conduct or harm serious enough to constitute a constitutional deprivation within the purview of § 1983. This is obvious when the allegations of his complaint are compared with those in the cases cited by the panel as authority for their conclusion that respondent's complaint was sufficient to state a claim

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19/At the default hearing, respondent's main witness, Bobby Tuzon, the jailhouse lawyer who had drafted respondent's complaint testified that there were several barriers between petitioners and respondent when the fight started and that the fight was very brief. See Appendix D p. A22-A23.

under § 1983.[20/]

In finding that the complaint stated a violation of substantive due process, the panel relied on five cases, i.e. Gaut v. Sunn, 792 F.2d 874 (9th Cir. 1986); Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973); Norris v. District of Columbia, 737 F.2d 1148 (D.C.Cir. 1984); and Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986).

In Gaut, the plaintiff alleged that "he was severely beaten, kicked, choked, and thrown against a wall by several guards when he shuffled

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20/Our research has failed to disclose a case from any of the circuits where such trivial torts have been elevated to constitutional status. Even the Ninth Circuit had not previously lowered the threshold for section 1983 suits so far.

his feet during a prison 'shakedown,' and was beaten again while handcuffed after he was taken to a holding unit." 792 F.2d at 875.

In Meredith, the complaint alleged an "unprovoked assault and battery by [a] guard upon a prisoner known by the guard to be suffering from an attack of emphysema, by striking him in the solar plexus, hard enough that the 'attack rendered the patient plaintiff totally handicapped.'" 523 F.2d at 484.

In Johnson, the plaintiff alleged that the defendant "rushed into his holding cell, grabbed him by the collar and struck him twice on the head with something enclosed in the officer's fist . . .." 481 F.2d at 1029.

In Norris, the plaintiff alleged that correctional officers "without

provocation, maced, beat, and kicked him; . . . [and] that the resulting injuries . . .included temporary blindness, a burning sensation in his face, immediate pain which subsided after several hours, lingering blurred vision and a bruised and swollen left arm." 737 F.2d at 1149.

In Rutherford, the plaintiff alleged that the officers "without any provocation and without placing him under arrest . . . threw him to the ground, punched, kicked, and handcuffed him." 780 F.2d at 1445.

We submit that the misconduct respondent alleges pales considerably in comparison with the misconduct alleged in the five cases cited by the panel. In those cases there was egregious, brutal, shocking misconduct alleged in the complaints. No such shocking conduct is

alleged in respondent's complaint. In those cases the violations were committed by the defendants themselves. In thiscase the petitioners are not accused of assaulting respondent directly but rather of failing to protect him from assault by other prisoners.[21]/

---

[21]/Respondent's complaint does not allege the "pervasive risk" of harm that is the prerequisite for converting a failure to protect tort into a constitutional deprivation.

> "A pervasive risk of harm may not ordinarily be shown by pointing to a single incident or isolated incidents, but it may be established by much less than proof of a reign of violence and terror in the particular institution. * * * It is enough that violence and sexual assaults occur * * * with sufficient frequency that * * * prisoners * * * are put in reasonable fear for their safety and to reasonably apprise prison officials of the existence of the problem and the need for protective measures."

Withers v. Levine, 615 F.2d 158, 161 (4th Cir.), cert. denied, 449 U.S. 849 (1980).

Finally, in those five cases, there were injuries, obvious or alleged. In respondent's case there are none. Therefore, if Gaut, Meredith, Johnson, Norris, and Rutherford, set the standard, establish the threshold, and define the test for stating a violation of substantive due process, respondent's complaint falls far short. Furthermore, respondent's complaint cannot state a violation of substantive due process unless it is also sufficient to state a claim under the Cruel and Unusual Punishment Clause of the Eighth Amendment. See Whitley v. Albers, ____ U.S. _____, 106 S.Ct. 1078, 1088 (1986).

B. The Eighth Amendment claim

The Ninth Circuit devoted three sentences to its conclusion that respondent's complaint "alternatively" stated a valid § 1983 claim based upon the Eighth Amendment. It cited one case in support of this conclusion, i.e., O'Quinn v. Manuel 773 F.2d 605 (5th Cir. 1985) (plaintiff alleged that he suffered severe injuries as the result of a beating he received from other inmates in a poorly equipped and administered jail). Again, the allegation of severe injuries in O'Quinn distinguishes it from our case.

In order to differentiate Eighth Amendment violations from common law

torts, several circuits[22/] apply the following standard and three-part test. Eighth Amendment protection against cruel and unusual punishment is "nowhere nearly so extensive as that afforded by the common law tort action for battery." Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied, 414 U.S. 1033 (1973). To state an Eighth Amendment violation there must be "the unnecessary and wanton infliction of pain." Gregg v. Georgia, 428 U.S. 153, 173 (1976). This standard imposes three requirements for a prisoner to meet in order to state a cause of action under the Eighth Amendment and section 1983.

22/ See, e.g., Gumz v. Morrissette, 772 F.2d 1395 (7th Cir. 1985); Wise v. Bravo, 666 F.2d 1328 (10th Cir. 1981); Shillingford v. Holmes, 634 F.2d 263 (5th Cir. 1981); and Hall v. Tawney, 621 F.2d 607 (4th Cir. 1980).

> First, 'wanton' requires that the guard have intended to harm the inmate. Second, 'unnecessary' requires the force used to have been more than appeared reasonably necessary at the time of the use of force to maintain or restore discipline. Third, 'pain' means more than momentary discomfort; the attack must have resulted in either severe pain or a lasting injury.

Sampley v. Ruettgers, 704 F.2d 491, 495 (10th Cir. 1983).

We submit that the Ninth Circuit should have applied this test. It substantially simplifies the delicate task of line-drawing in these prisoner cases. If this test had been used, respondent would have failed requirements one and three.

The Eighth Amendment requires an intent to harm. As pointed out previously, respondent's complaint does not contain a clear allegation that petitioners intended to harm him. More serious, however, is the absence from the

complaint of an allegation of severe pain or lasting injury. Minor injuries do not constitute a violation of the Eighth Amendment.

> Although 'the least touching of another in anger is a battery,' Cole v. Turner, 6 Mod. 149, 87 Eng. Rep. 907, 90 Eng. Rep. 958 (K.B. 1704) (Holt, C.J.), it is not a violation of a constitutional right actionable under 42 U.S.C. § 1983. The management by a few guards of large numbers of prisoners, not usually the most gentle or tractable of men and women, may require and justify the occasional use of a degree of intentional force. Not every push or shove, even if it may later seem unnecessary in the peace of a judge's chambers, violates a prisoner's constitutional rights. In determining whether the constitutaionl line has been crossed, a court must look to such factors as . . . the extent of injury inflicted . . .

Johnson v. Glick, 481 F.2d 1028, 1033 (2d Cir.), cert. denied sub nom. John v. Johnson, 414 U.S. 1033 (1973).

Here that decision is easy. Respondent does not allege that any harm befell him as the result of petitioners' conduct. He clearly does not allege the serious harm that is the sine qua non for converting his tort claim into a constitutional claim. Respondent's complaint simply fails to allege conduct or injury sufficiently shocking or serious to implicate the Constitution.[23]

---

[23] Respondent's complaint does not contain the stuff constitutional torts are made of. Judge Posner put it well in this quotation from Bart v. Telford, 677 F.2d 622, 625 (7th Cir. 1982): "Yet even in the field of constitutional torts de minimis non curat lex. Section 1983 is a tort statute. A tort to be actionable requires injury."

CONCLUSION

Federal judicial involvement in cases like this is absurd. Section 1983 coverage of such trivial torts threatens to swallow up state tort law. For these reasons and others set forth herein, this petition for certiorari should be granted and the decision of the Court of Appeals reversed.

Respectfully submitted,

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June 9, 1987

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APPENDIX A

OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

STEVE BENNY, *Plaintiff-Appellee,* v. DANNY PIPES and CHARLES PAYNE, *Defendants-Appellants.*	No. 85-2347 D.C. No. CV84-458 PHX CLH ORDER AND AMENDED OPINION

Argued and Submitted
June 12, 1986—San Francisco, California

Filed September 5, 1986
Amended January 16, 1987

Before: Harry Pregerson, Cecil F. Poole and
John T. Noonan, Jr., Circuit Judges.

Opinion by Judge Pregerson

Appeal from the United States District Court
for the District of Arizona
Charles L. Hardy, District Judge, Presiding

SUMMARY

Civil Rights/Courts and Procedure

Appeal from default judgment granted against defendants. Affirmed.

Appellee Steve Benny brought a civil rights action against six guards from an Arizona state prison in which he was an inmate, alleging the officers failed to protect him from physi-

cal and sexual assaults by other prisoners, and that guard Danny Pipes struck him. The summons and complaints were filed on the guards by prisoners from the facility, who were both convicted felons. Both attested to the service in sworn affidavits. The guards reacted to the summons by crumpling the papers and throwing them to one side as trash. When the guards did not answer, Benny sought a default judgment. The guards moved on three separate occasions for enlargement of the time to respond, and after three delays the guards still filed no answer. The court ordered entry of a default judgment against the guards. Six months later, the guards unsuccessfully moved to set aside the defaults. The district court later eliminated one of the defendants, and awarded damages against the other two.

[1] Whether the guards' pre-answer motions seeking more time constituted a general appearance so as to waive any jurisdictional defects is a close question. While the motions to extend time show some intention to defend the suit, they do not manifest a clear purpose to defend, although the third motion specifically reserves the option of asserting an affirmative defense based on insufficiency of service. [2] The motions did not delay the action significantly or prejudice Benny substantially, [3] and were insufficient to constitute a general appearance.

[4] Even accepting the guards' view that under Arizona law the other prisoners were unable to serve process, their argument is beside the point because in a federal question case federal rules override any contrary state procedural law. [5] Nothing in the legislative history suggests that Congress intended to exclude prisoners from those who can give service of process. [6] The Federal Rules of Civil Procedure allow any person over 18 who is not a party to the suit to serve the summons and complaint and the court correctly concluded it had personal jurisdiction over Benny's complaint.

[7] The district court did not abuse its discretion in refusing to set aside the default judgment if the guards' culpable con-

duct led to the default. [8] Here, the guards do not contest that they received the summonses and complaints, and their motions to extend their time to answer proves conclusively that they had actual notice of the complaint. Because they had notice, and the service was valid, the guards' refusal to answer was culpable, and the district court correctly refused to vacate the default judgment.

[9] Well-pleaded allegations are taken as admitted on a default judgment. Because Benny's allegations that the guards deliberately stood aside while he was assaulted by other prisoners and that Pipes struck him involved intentional actions, Benny has shown a violation of substantive due process. He also stated an eighth amendment claim. [10] The district court was correct in awarding damages against the guards.

COUNSEL

Ronald J. Greenhalgh, Assistant Attorney General, Phoenix, Arizona, for the defendants-appellants.

James T. Bialae, Phoenix, Arizona, for the plaintiff-appellee.

ORDER

The court's opinion in this case filed September 5, 1986, is amended as follows:

At page 12 of the Slip Opinion, the parenthetical after the citation to *Meredith v. Arizona,* 523 F.2d 481, 482-83 (9th Cir. 1975), which reads "single blow by guard is a substantive due process violation," is amended to read "single blow by a guard *can be* a substantive due process violation."

OPINION

PREGERSON, Circuit Judge.

This case requires us to decide the breadth of Fed. R. Civ. P. 4. Two prisoners filed suit against several prison guards. A fellow prisoner served the summonses and complaints. Because the guards failed to answer the complaint, the district court entered a default judgment against them, and later awarded damages to one prisoner. The guards argue that a summons and complaint served by a prisoner is invalid under Fed. R. Civ. P. 4. They also argue, in the alternative, that the district court should have set aside their default, or that the prisoners' complaint failed to state a valid claim. We affirm.

FACTS

Steve Benny and Bobby Tuzon, both then prisoners in Arizona State Penitentiary in Florence, Arizona, sued six Florence prison guards under 42 U.S.C. § 1983. The complaint alleged various constitutional violations under five counts. Count one alleged that Corrections Service Officers Danny Pipes, Charles Payne, and Tony Gilbreath failed to protect Benny from physical and sexual assaults by other prisoners. This count also alleged that Pipes struck Benny. Counts two through five alleged that Sergeant Richard Towne and Lieutenant Willard Gotcher prevented Tuzon from assisting Benny in processing his administrative complaint against Pipes, Payne, and Gilbreath, and that these three officers retaliated in various ways against Tuzon for persisting in his efforts to assist Benny.[1] Subsequently at Tuzon's request, the district court dismissed all Tuzon's claims, leaving Benny as the sole plaintiff.

[1]The complaint makes no accusation against the sixth officer named in the complaint, CSO Edward Procela, Jr. The complaint only refers to Procela as a witness to Benny's signature on Benny's administrative complaint against Pipes, Payne, and Gilbreath. Apparently, Procela was never served.

Jerald E. Lee, a Florence prisoner and a convicted felon, personally served the summons and complaint on Gilbreath on March 23, 1984, and on Payne on March 29, 1984. Phillip E. Wolf, also a prisoner at Florence, and a convicted felon, served the summons and complaint on Pipes on March 27, 1984. Lee and Wolf attested to the fact of each of these services in sworn affidavits. Apparently, the guards reacted to the service by crumpling the papers and throwing them to one side as trash.

Because the guards had not answered, Benny sought a default judgment. Pipes, Payne, and Gilbreath ("the guards") moved on three separate occasions for enlargement of time to respond to the complaint. On June 27, 1984, the district court granted the guards an extension to July 12, and on July 13, in response to the third motion to enlarge, granted the guards additional time until August 24 to answer the complaint.[2]

The guards filed no answer. Thus, on October 5, 1984, the district court ordered the entry of a default judgment against Payne and Pipes.[3] Six months later, the guards unsuccessfully moved to set aside the defaults. Later, after an evidentiary hearing, the district court awarded Benny $2,000 damages against Pipes and Payne. The court exonerated Gilbreath of

[2]The court apparently did not respond to the guards' first motion to enlarge time to answer. The motion was filed in response to Benny's motion for a default judgment. The court may not have acted on the guards' motion because Benny filed his default judgment motion before the time permitted for the guards to answer his complaint had expired.

[3]The district court erroneously omitted Gilbreath from the default judgment. On April 2, 1985, the court ordered Gilbreath's default *nunc pro tunc* as of October 5, 1984.

The court also ordered default judgments against Towne and Gotcher. The court later set aside these two defaults because Towne and Gotcher were implicated only in the counts alleging actions directed at Tuzon. On July 30, 1984, the court had consented to a stipulation dismissing with prejudice all claims concerning Tuzon.

liability and dismissed Benny's action as to Gilbreath. Pipes and Payne timely appealed.

STANDARD OF REVIEW

A federal court is without personal jurisdiction over a defendant unless the defendant has been served in accordance with Fed. R. Civ. P. 4. *Jackson v. Hayakawa*, 682 F.2d 1344, 1347 (9th Cir. 1982). A district court's determination that it may exercise personal jurisdiction over a defendant is a question of law which we review *de novo* when the underlying facts are not disputed. *Pacific Atlantic Trading Co. v. M/V Main Express*, 758 F.2d 1325, 1326 (9th Cir. 1985). "Rule 4 is a flexible rule that should be liberally construed so long as a party receives sufficient notice of the complaint." *United Food & Commercial Workers Union, Locals 197, 373, 428, 588, 775, 839, 870, 1119, 1179, and 1532 v. Alpha Beta Co.*, 736 F.2d 1371, 1382 (9th Cir. 1984). However, neither actual notice nor simply naming the defendant in the complaint will provide personal jurisdiction without "substantial compliance with Rule 4." *Jackson*, 682 F.2d at 1347. A general appearance or responsive pleading by a defendant that fails to dispute personal jurisdiction will waive any defect in service or personal jurisdiction. *Id.*; Fed. R. Civ. P. 12(h)(1).

A failure to make a timely answer to a properly served complaint will justify the entry of a default judgment. Fed. R. Civ. P. 55. We may set aside a default judgment only for good cause. Fed. R. Civ. P. 60(b); *see generally Wilson v. Moore and Associates, Inc.*, 564 F.2d 366, 368-69 (9th Cir. 1977). We review a district court's denial of a motion to set aside a default judgment for an abuse of discretion. *Pena v. Seguros La Comercial, S.A.*, 770 F.2d 811, 814 (9th Cir. 1985). We will reverse such a decision "only upon a *clear showing* of abuse of discretion." *Id.* (emphasis in original) (quoting *Ellis v. Brotherhood of Railway, Airline & Steamship Clerks*, 685 F.2d 1065, 1071 (9th Cir. 1982), *aff'd in relevant part*, 466 U.S. 435 (1984)).

ANALYSIS

A.

Benny asserts that the guards made a general appearance, and thereby waived any objection to service of process under Rule 4, by filing three motions to enlarge their time to respond to Benny's complaint. "An appearance ordinarily is an overt act by which the party comes into court and submits to the jurisdiction of the court. This is an affirmative act involving knowledge of the suit and an intention to appear." 28 Fed. Proc. (L. Ed.) § 65.137 at 526 (1984); *see also Wilson,* 564 F.2d at 369 (informal contact between parties constitutes appearance when defendant shows "clear purpose to defend the suit"); *Maricopa County v. American Petrofina, Inc.*, 322 F. Supp. 467, 469-70 (N.D. Cal. 1971) (seeking three stipulations to extend time to respond to complaint, including one approved by court, estopped defendant from denying service of process).

[1] Whether the guards' pre-answer motions constituted a general appearance is a close question. Indeed, the district court apparently thought the guards' motions constituted an appearance. The guards made no discernible objection to service of process in either of their first two applications for additional time to answer Benny's complaint. While, arguably, the first two motions to extend time show some intention to defend the suit, they do not manifest a "clear purpose" to defend. *Compare* Fed. R. Civ. P. 12(h)(1)(A) (failure to raise insufficiency of process in any Rule 12 motion waives defense); *and H.F. Livermore Corp. v. Aktiengesellscaft Gebruder Loepfe,* 432 F.2d 689, 692 (D.C. Cir. 1970) (75 days of settlement discussions constitute appearance); *with Wilson,* 564 F.2d at 369 (letter to plaintiff responding to allegations in complaint is not appearance); *and Anderson v. Taylorcraft, Inc.*, 197 F. Supp. 872, 874 (W.D. Pa. 1961) (letter to clerk notifying change of address is not appearance). However, the guards' third motion specifically reserves the

option of asserting an affirmative defense based on insufficiency of service.

[2] Generally, a motion to extend time to respond gives not hint that the answer will waive personal jurisdiction defects, and is probably best viewed as a holding maneuver while counsel consider how to proceed. The first two motions to enlarge sought additional time because of counsel's involvement in several other trials where Tuzon was the plaintiff. Certainly the guards would have been well advised to include statements in these two motions that they were not waiving any affirmative defenses, but it would be harsh indeed to label these pre-answer omissions as a general appearance. The third motion specifically reserved the defense, and, ultimately, the guards failed to answer and Benny took their defaults. The motions did not delay the action significantly nor prejudice Benny substantially—Benny obtained his defaults within six months of filing his complaint.

[3] Thus, we conclude that the guards' actions here were insufficient to constitute a general appearance. We, therefore, turn to the guards' substantive argument that service was invalid because the process servers, Lee and Wolf, were then incarcerated felons.

B.

In 1983, Congress substantially amended Rule 4. *See* Federal Rules of Civil Procedure Amendments Act of 1982, Pub. L. 97-462 § 2 *reprinted in* 1982 U.S. Code Cong. & Ad. News (96 Stat.) 2527, 2527-28. Fed. R. Civ. P. 4(c)(2)(A) now states: "A summons and complaint shall . . . be served by any person who is not a party and is not less than 18 years of age." Rule 4(c)(2)(B) and (C) provide certain limited exceptions to this rule, none of which apply here.[4]

[4]These exceptions permit service by a Marshal for: a person proceeding *in forma pauperis*; a seaman in certain circumstances; and the United

At Benny's request, two fellow prisoners, Lee and Wolf, served the summons and complaint on each of the guards. Neither Lee nor Wolf is a party to the action, and, since they are in an adult prison, both must be over 18 years of age. The guards note that, under Arizona law, prisoners lose certain civil rights on conviction. *See* Ariz. Rev. Stat. §§ 13-904(A)(2) (prisoner forfeits "right to hold public office of trust"), 13-904(A)(4) (prisoner forfeits "any other civil rights the suspension of which is reasonably necessary for the security of the institution."). The guards assert that the right to serve process is among those rights forfeited by Arizona state prisoners, and that, therefore, service was invalid.

[4] Even accepting the guards' expansive reading of Arizona law, their argument is besides the point. In a diversity suit, the mandate of the federal rules will override any contrary state procedural law. *See Hanna v. Plumer,* 380 U.S. 460, 463-64 (1965). In a federal question case such as Benny's suit, federal procedural law indisputably controls. *See* Siegel, *Practice Commentary on FRCP Rule 4* C4-15, *reprinted in* 28 U.S.C.A. App. (West Supp. 1985) ("Equally significant is that this authority [to any non-party over 18 to serve a summons and complaint], coming directly from Rule 4, no longer depends on state law.").

[5] There is nothing whatever in the legislative history of Rule 4 to suggest in any way that Congress intended any exceptions to Rule 4(c)(2)(A) other than those expressly enu-

States as a federal officer or agency. Fed. R. Civ. P. 4(c)(2)(B)(i) and (ii). When these exceptions apply, a court may order service by a Marshal or appoint another person to serve process. Fed. R. Civ. P. 4(c)(2)(B)(iii). Alternatively, service upon any competent adult or corporation may be made by following the procedure of the forum state, Fed. R. Civ. P. 4(c)(2)(C)(i), or by mail enclosing a prepaid acknowledgement form, Fed. R. Civ. P. 4(c)(2)(C)(ii). While Benny probably could have sought *in forma pauperis* status and used Marshal service, he preferred to pay the filing fees and use Lee and Wolf to effect personal service.

merated in Rule 4(c)(2)(B) and (c)(2)(C).[5] Certainly there is no reason to believe that Congress intended to exclude prisoners from the plain words of the rule. Service by a prisoner will presumably occur only when the plaintiff is also a prisoner. Given Congress' sensitivity to the volume of federal suits filed by prisoners, *see, e.g.*, 42 U.S.C. § 1997e (administrative exhaustion required for prisoners' section 1983 suits), Congress would surely have given a clear indication in the amended rule had it wished to limit the opportunity for prisoner suits by preventing personal service by prisoners.

[6] Thus, we hold that Rule 4 means precisely what it says: save for those few special situations expressly enumerated in the Rule, *any* person over 18, who is not a party to the suit, may serve the summons and complaint. The district court was, therefore, correct to conclude that it had personal jurisdiction over Benny's complaint against the guards. Lee and Wolf, both convicted felons and incarcerated prisoners, served valid process on the guards.[6]

C.

[7] In determining whether the district court abused its discretion in refusing to set aside the default judgment, we must ensure that the motion to vacate does not become a substitute for appeal. *Pena*, 770 F.2d at 814; *Falk v. Allen*, 739 F.2d 461,

[5] "New Rule 4(c)(2)(A) sets forth the general rule that summonses and complaints shall be served by someone who is at least 18 years old and not a party to the action or proceeding. . . . Subparagraph (B) sets forth 3 exceptions to the general rule. . . . Subparagraph (C) of new Rule 4(c)(2) provides 2 exceptions to the general rule of service by a nonparty adult." 128 Cong. Rec. H 9851 (daily ed. Dec. 15, 1982) (statement of Rep. Edwards). The full legislative history of amended Rule 4 is found at 128 Cong. Rec. H 9848-56 (daily ed. Dec. 15, 1982) and is substantially reprinted at 28 U.S.C.A. Federal Rules of Civil Procedure 1 to 11 App. at 85-92 (West Supp. 1986).

[6] This case does not present the question whether Arizona might validly impose reasonable time, place, and manner restrictions on prisoner service of process on prison officials.

463 (9th Cir. 1984) (per curiam). When we review the court's refusal to set aside the guards' default, we must consider: (1) whether Benny will be prejudiced if the default judgment is vacated; (2) whether the guards have a meritorious defense to Benny's complaint; and (3) whether the guards' "culpable conduct" led to the default. *Pena*, 770 F.2d at 814-15. However, if the guards' conduct provoked the default, we need not consider the first two elements. *Id.* at 815.

[8] In *Pena*, we held that a defendant's constructive notice of a complaint was sufficient to constitute culpable conduct. *Id.* The defendant in *Pena* provided an incorrect address both to the plaintiff and the state licensing authority, and thus never received actual notice of the complaint which was served by mail. *Id.* Here, the guards do not contest that they received the summonses and complaints from Lee and Wolf. Indeed, the guards' motions to extend their time to answer Benny's complaint prove conclusively that they had actual notice of the complaint and were aware of its contents. Because they had notice of the complaint, and because the service by Lee and Wolf was valid, the guards' failure to answer was culpable. The district court thus was correct to refuse to vacate the default judgment.[7]

[7]On October 17, 1984, twelve days after the entry of the default judgment, the guards filed an untimely motion to dismiss Benny's complaint due to improper service. The district court did not formally deny this motion until April 2, 1985, holding that the validity of Lee's service had been considered before the order of default was entered. On April 2, the district court also set a date for the default hearing, set aside the defaults of Gotcher and Towne, dismissed the motions to dismiss of Gotcher and Towne as moot, and entered the *nunc pro tunc* default judgment against Gilbreath. The court's decision to deal belatedly with the guards' motion to dismiss was apparently part of a general "house cleaning" of the case file. The guards formally moved to set aside the default judgment on April 12, 1985. The guards' culpable conduct in failing to answer the complaint obviates any need for us to consider Benny's contention that the guards' delay in filing a formal Rule 60(b) motion precludes a successful set aside motion.

D.

The guards argue that, even if the district court correctly entered the default judgments against them, and accepting that they acted as described in Benny's complaint, Benny's allegations are insufficient to state a cause of action against the guards under section 1983. The guards argue that a minor assault by a prison guard, or a malicious failure to intervene in a fight between prisoners, does not violate Benny's due process rights. *See Daniels v. Williams,* 106 S. Ct. 662, 663 (1986) (due process clause not implicated by officer's negligent act.).

[9] Well-pleaded allegations are taken as admitted on a default judgment. *Thompson v. Wooster,* 114 U.S. 104, 114 (1884); *In re Visioneering Construction,* 661 F.2d 119, 124 (9th Cir. 1981). Benny alleged that the guards deliberately stood aside while he was assaulted by other prisoners, and that Pipes struck him once. Because the guards' actions were intentional, not negligent, the guards' argument must fail. Benny must be taken to have shown a violation of a substantive due process. *See Gaut v. Sunn,* 792 F.2d 874, 875 (9th Cir. 1986) (per curiam) (threats of violence by guards can violate substantive due process); *Meredith v. Arizona,* 523 F.2d 481, 482-83 (9th Cir. 1975) (single blow by a guard can be a substantive due process violation); *Johnson v. Glick,* 481 F.2d 1028, 1033 (2d Cir.), *cert. denied,* 414 U.S. 1033 (1973); *Norris v. District of Columbia,* 737 F.2d 1148, 1151-52 (D.C. Cir. 1984) (substantive due process violated if guard uses force which is "undue," "excessive," or "unjustified"). A violation of substantive due process states a claim under section 1983. *See Rutherford v. City of Berkeley,* 780 F.2d 1444, 1448 (9th Cir. 1986). Alternatively, Benny has stated a valid section 1983 claim based on the eighth amendment. An eighth amendment-based section 1983 suit states a claim for relief in federal court. *See O'Quinn v. Manuel,* 773 F.2d 605, 607-08 (5th Cir. 1985).

[10] The district court was therefore correct to award damages against the guards.[8]

AFFIRMED.

[8]The district court properly held an evidentiary hearing before awarding damages. *See Davis v. Fendler*, 650 F.2d 1154, 1161 (9th Cir. 1981). Neither Benny nor the guards contest the amount of the damages awarded against Pipes and Payne. Benny does not contest the court's decision that he take nothing from Gilbreath.

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APPENDIX B

ORDER OF THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT DENYING PETITION FOR REHEARING AND REJECTING THE SUGGESTION FOR REHEARING EN BANC

STEVE BENNY, et al.
Plaintiff,

v.

DANNY PIPES, et al.
Defendant(s).

No. 85-2347

United States Court of Appeals
For the Ninth Circuit

February 9, 1987

ORDER

Before: PREGERSON, POOLE, and NOONAN, Circuit Judges.

The panel as constituted above voted to deny the petition for rehearing and to reject the suggestion for rehearing en banc.

The full court has been advised of the suggestion for rehearing en banc, and no judge of the court has requested a vote on the suggestion for rehearing en banc. Fed. R. App. P. 35(b).

The petition for rehearing is denied, and the suggestion for rehearing en banc is rejected.

APPENDIX C

JUDGMENT OF THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF ARIZONA

STEVE BENNY, et al.
Plaintiff,

v.

DANNY PIPES, et al.
Defendant(s).

No. CIV 84-488 PHX CLH

United States District Court,
D. Arizona

June 20, 1985

JUDGEMENT

The defaults of the defendants Pipes, Payne and Gilbreath were entered. A trial was held on June 3, 1985, on the issue of damages. The defendants were represented by counsel. After all of the evidence was presented and the matter argued to the Court, it was taken under advisement. The Court will award judgment in the sum of $2,000 in favor of pliantiff and against the defendants Pipes and Payne.

Plaintiff's complaint is based upon two incidents. In one he was fighting with another prisoner. The defendant Pipes broke up the fight. There was no evidence that Pipes did anything to cause injury to plaintiff.

In the other incident, the defendants are alleged to have placed plaintiff in an exercise case with knowledge that he would likely be attacked by other prisoners.

During the hearing on damages there was absolutely no evidence to suggest the presence or participation of the defendant Gilbreath.

IT IS ORDERED that plaintiff have judgment against the defendants Pipes and Payne in the sum of $2,000.

IT IS FURTHER ORDERED plaintiff take nothing by his complaint against the defendant Gilbreath and that judgment be

entered in favor of the defendant Gilbreath.

APPENDIX D

PORTION OF REPORTER'S TRANSCRIPT FROM DEFAULT HEARING

Q. Directing your attention now to the event of the urine or the assault by the other prisoners, do you recall when that took place without referring to the complaint?

A. It happened in February, about a month after that incident.

Q. And can you tell us where the inmate by the name of Kelly was housed that allegedly assaulted the plaintiff?

A. He was in Able 10, next to me.

Q. And where was he at the time that the assault took place?

A. In the exercise pen.

Q. And where were the defendants?

A. Mr. Pipes and Mr. Payne?

Q. Uh huh?

A. They were upstairs. We have a exercise pen that resides on the ground. We have a step that goes up to the main

walking circle, and then you look down in the exercise pen. They were standing up there.

Q. They were physically -- how far removed were they from inmates Kelly and Benny?

A. Probably twenty or thirty feet and two locked doors.

Q. And did I understand your testimony earlier to say that inmate Kelly threw a bottle of urine on Mr. Benny?

A. No, Robert Vaughn did that.

Q. Excuse me. Robert Vaughn threw a bottle of urine on Mr. Benny?

A. Yes, sir,

Q. Was there any other inmate that threw urine on inmate Benny?

A. There were several inmates there. Robert Vaughn is the one I saw throw urine.

Q. Was there only one incident of

throwing urine?

A. That was in the month of February, yes.

Q. Can you give us the chronology of events concerning the throwing of urine by Vaughn and then the assault by inmate Kelly? What was the sequence that thoseevents took place in?

A. You only have two exercise pens in CB-1, one by Psych run, which is over by George run which is on the other side of the building, and you have on directly in front of Able run. The people on Able run did not want Mr. Benny exercising in that area, and whenever he was brought over there everybody would -- I wasn't one -- but the others that were there would throw anything on him, water, didn't matter what it was they just did not want him in that exercise area. And everytime the officer would put Mr. Benny

there -- it was usually Mr. Pipes or Mr. Payne -- some sort of water throwing or urine throwing would occur.

Q. Okay. But in reference to the specific allegations made in the complaint of the throwing of uring by inmate Vaughn and the assault by inmate Kelly, what was the sequence of events? How did those events take place?

A. Kelly was in the exercise pen, and they put Mr. Benny in with Mr. Kelly. And there were several inmates in there,I guess from the other side of the building. And I guess Mr. Benny went up to Mr. Kelly, and they had some words. And I guess Kelly is not very patient, and he just kind of pushed him out, and when he fell over this rail fence of the exercise area Mr. Vaughn threw urine and everything else that they had been saving on him.

THE COURT: All this happened at the same time?

THE WITNESS: Yes.

THE COURT: Where were defendants Pipes and Payne at this time?

THE WITNESS: Standing up on the main walk circle of Cell Block 1 looking down on the incident.

Q. And approximately what distance away?

A. About thirty feet or so.

Q. And two locked doors between them?

A. A locked door and a chain lock.

Q. And how long did it take them to get down from where they were to where the fight was occurring?

A. They didn't go down. They let it happen.

Q. How long did they stand and watch then?

A. That's all they did.

Q. For what period of time?

A. They never went down. Steve stayed down this whole exercise. He kneeled down in the corner.

Q. While the fight occurred?

A. No, that was one moment. Steve went over in the corner and set in the corner like a scared animal.

Q. So the fight lasted only a moment then?

A. Yes.

MR. GREENHALGH: Thank you. Nothing further.

APPENDIX E

COUNT I OF THE COMPLAINT

STEVE BENNY, et al.
Plaintiff,

v.

DANNY PIPES, et al.
Defendant(s).

No. CIV 84-488 PHX CLH

United States District Court,
D. Arizona

Complaint

On or about January 2, 1984, CSO Danny Pipes, ignored the pleas of inmate Steve Benny, about the threats against his life by another prisoner in a segregation area. Steve Benny had signed in Protective Custody and had a right to be protected. These threats were going on for several days prior to the assault, and CSO Danny Pipes told Steve Benny, that it is about time that he grew up and took care of business and be a man. CSO Danny Pipes then opened the cell doors on Able Run in Cell Block One (1), which is

a lock down type run.

CSO Danny Pipes ORDERED inmate Steve Benny to come out of his cell and go into the caged exercise area with the same inmates who were administrative segregation prisoners that had threatened such planned assaults, as sexual relationships, and a beating to boot.

One of the administrative segregation prisoners made a threatening gesture with his fists to hit Steve Benny and the fight was on. Steve Benny was holding his own until CSO Danny Pipes raised the iron panel crank that is used to open and clsoe [sic] the cell doors, and swung it at Steve Benny, which caused Steve Benny to back up in order to not be hit by the iron crank.

CSO Danny Pipes held the iron bar above his head in a striking position towards Steve Benny's head while hand

cuffing him and used abusive force as he (Pipes) [sic] removed Steve Benny from the Able Run area.

CSO Danny Pipes then wrote Steve Benny a Disciplinary Report that was to serve as a method to cover up his (Pipes) own misconduct.

While Steve Benny was on deadlock on George Run, CSO Pipes, CSO Payne and CSO Gilreath joined in concert and conspired together and placed Steve Benny in the same exercise cage in front of Able Run, where the same prisoners had attacked Steve Benny. They (prisoners) [sic] would throw urine on Steve Benny and tow [sic] occasions, CSO Pipes and CSO Payne stood by and let one Administrative Segregation prionser [sic] kick Steve Benny and the other hit him in the face with their fist. This occurred

during the week of February 6, 1984 and CSO Payne stated to CSO Pipes with hissick laughter " that's good for the boy !"

Warden Goldsmith had authorized Bobby Tuzon to mix with protective custody prisoner, which included representing them if he wanted to. On or about January 5, 1984, Steve Benny gave Bobby Tuzon a Limited Power of Attorney so he could sign the Form 3-A that was witnessed by CSO Tony Gilreath.

On or about January 20, 1984, a legal conference was granted by Capt. Luna between Bobby Tuzon and Steve Benny, Sgt. White was present when this meeting took place so they could be prepared for the January 23, 1984 Hearing date.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

No. 86-2064

In The

SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANNY PIPES, and CHARLES PAYNE,

Petitioners,

vs.

STEVE BENNY,

Respondent.

BRIEF OF RESPONDENT IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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No. 86-2064

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1986

DANNY PIPES, and CHARLES PAYNE,

Petitioners,

vs.

STEVE BENNY,

Respondent.

RESPONDENT, Steve Benny, opposes Petitioners request that a Writ of Certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in this proceeding on September 5, 1986, and amended on January 16, 1987, Affirming the Judgment of the United States District Court for the District of Arizona.

STATEMENT OF THE CASE

Petitioners have basically set out to the Court in their Petition for a Writ of Certiorari the statement of the case, and it is not necessary to make any correction thereon pursuant to Rule 34.2.

SUMMARY OF ARGUMENT IN OPPOSITION TO GRANTING THE WRIT

1. The Petition neglects to set forth considerations governing the issuance of an extraordinary writ in that it does not set forth the Court's jurisdiction pursuant to Rules 21.1(e)(iv), 21.2 and 27.2(b).

2. The Petition seeks review of certain factual and legal determinations by the District Court and affirmed by the Ninth Circuit Court of Appeals but fails to establish any special and important reasons for granting the writ.

3. The District Court and the Ninth Circuit Court of Appeals correctly found that Respondent was entitled to the relief granted him pursuant to his complaint filed under the authority of 42 U.S.C. §1983.

REASONS FOR DENYING THE WRIT

1. THE PETITION DOES NOT INVOKE THE JURISDICTION OF THIS COURT.

The Petition filed herein does not follow the Rules of the Supreme Court of the United States.

Rule 21.1(e)(iv) states:

> ".1 The Petition for Writ of Certiorari shall contain, in the order here indicated: . . .
> (e)(iv) The statutory provision believed to confer on this Court jurisdiction to review the judgment or decree in question by writ of certiorari.
> Rule 21.2 states in part:
> ". . . The clerk shall not accept any petition for writ of certiorari that does not comply with this rule . . ."
> Rule 27.2(b) states in part:
> "The petition shall follow, insofar as applicable, the form for the petition for writ of certiorari prescribed by Rule 21.
> . . ."

The Petition for Writ of Certiorari filed herein states under the heading of "Jurisdiction," on pages 2 and 3 therein, the background of the law suit presented for review but neglects to make any mention whatsoever of this Court's jurisdiction to entertain this matter. The petition is fatally defective in that the jurisdictional requirements of Rules 21.1(e)(iv), 21.2 and 27.2(b) were not followed by Petitioner.

2. THE DOCTRINE DEVELOPED IN PARRATT V. TAYLOR IS NOT APPLICABLE, AND WAS NOT ARGUED BELOW.

The issues presented below do not turn upon the doctrine developed in Parratt v. Taylor, 451 U.S. 527 (1981). Parratt, in dealing with 42 U.S.C. §1983, dealt with the negligent taking of property by an employee of a state, and dealt only with property interests.

The Court in Daniels v. Williams, 106 S.Ct. 662 (1986), goes on to say on page 663 in discussing Parratt:

> "We conclude that the due Process Clause is simply not implicated by negligent act of an official causing unintended loss of or injury to life, liberty or property"

Davidson v. Cannon, 106 S.Ct. 668 (1986), also states that the protections of the Due Process Clause, whether procedural or substantive, are just not triggered by lack of due care by prison officials. In this case the claim was always related to the intentional conduct of the prison officials, and as shown, the doctrine of Parratt does not apply.

Further, the only mention of Parratt in appellant's opening brief in the Ninth Circuit is found in a footnote with two other cases on page 14 therein, and is a footnote to the statement "at best plaintiff has alleged a cause of action for tort which could and should be brought in state court." This does not address the issues stated in petitioner's Petition for a Writ of Certiorari in discussing the "doctrine" developed in Parratt v. Taylor.

The Court declined to consider an issue which was raised for the first time in the petition for certiorari in United States v. Ortiz, 422 U.S. 891, 898 (1975). Ramsey v. Mine Workers, 401 U.S. 302, 312 (1971) held that it was inappropriate to consider an argument in the first instance. While in Lawn v. United States, 355 U.S. 339, 362 n.16 (1958) the Court held that only in exceptional cases will the Court review a question not raised in the Court below. No exceptional reasons have been advanced by Petitioners, and none exist.

3. THE PETITIONERS HEREIN WERE DEFAULTED, AND CANNOT NOW COMPLAIN ABOUT THE COURT'S RULINGS.

On page 8 of Petition for a Writ of Certiorari, the Petitioners stated that they were not appealing issue 2 of their case before the Ninth Circuit Court of Appeals which dealt with "whether the district court abused its discretion in refusing to set aside a default which had been entered when no response had been made to a complaint which had been served by convicted felons doing time in Arizona State Prison."

Therefore, there can be no question but that the default was valid and established the well-pleaded allgations of the complaint. In Re. Cons. Pretrial Proceedings in Air West, 436 F.Supp. 1281 (1987).

Even though the complaint was filed and prepared by a prisoner, not a lawyer, both the District Court and the Ninth Circuit found that the pleadings were sufficient to state a claim under 42 U.S.C. §1983 (see Petitioners Appendix A at P. 12.

Trans World Airlines, Inc., v. Hughes, 38 F.R.D. 409, 501 (1965) states clearly and concisely the law relating to defaults and the effect thereof. The following, found on page 501 of the opinion, properly states the position taken by Respondent herein.

> "By virtue of the default the defendant has admitted the truth of the well-pleaded allegations of the complaint. (cite)
> Allegations are not well pleaded if they are shown to be indefinite or erroneous by other statements in the complaint (cite); or where they are contrary to facts of which the court will take judicial notice (cite); or where they are not susceptible of proof by legitimate evidence (cite); or where they are contrary to uncontroverted material in the file of the case (cite). . . .
> If evidence merely tends to show that an allegation is not true, the allegation must be taken as true in the default. Finally, the plaintiff is entitled to the benefit of all reasonable inferences from the evidence tendered.
> Attempts by defendant to escape the effects of its default should be strictly circumscribed. It should not be afforded an opportunity to litigate what has already been deemed admitted in law. In the absence of an exceedingly strong showing that an allegation is untrue under the rules set forth above, the allegation stands as admitted." (emphasis added)

Geddes v. United Financial Group, 559 F.2d 557,560 (1977) states:

> "The general rule of law is that upon default the factual allegations of the complaint, except those relating to the amount of damages, will be taken as true (cite). Support for this general rule is found in Rule 8(d) of the Federal Rules of Civil Procedure which reads:
> "Averments in a pleading to which a responsive pleading is required, other then those as to the amount of damage, are admitted when not denied in the responsive pleading."
> Further support for the rule can be found in Federal Rule of Civil Procedure 55(b) which expressly autho-

rizes the court to conduct a hearing on the issue of damages before entering a judgment by default."

Pope v. United States, 323, U.S. 1, 655 S.Ct. 16, 89L. Ed. 3d (1944) holds that it is a judicial function and the exercise of the judicial power to render judgment when the defendant is in default.

In Re. Cons. Pretrial Proceedings in Air West, Supra, held that:

> "a default establishes the well-pleaded allegations of a complaint unless they are incapable of proof or are contrary to facts judically noticed or to uncontroverted material in the file. (cite). In addition, the party in whose favor a default has been entered is entitled to the benefit of all reasonable inferences from the evidence tendered, and attempts by the party agsint whom a default has been entered to attack the validity of the allegations deemed proven by the default are to be strictly circumscribed. (cite). This is so because a contrary rule would work to the benefit of the party who has obstructed the adjudication of an alleged wrongdoing by refusing to answer or otherwise defend, a result repugnant to the American system of justice."

A complete reading of the complaint shows that the respondent did in fact make well-pleaded allegations in his complaint. They were definite and not made erroneous by other statements in the complaint. They were not contrary to facts of which the court will take judicial notice. They were susceptable of proof by legitimate evidence (see transcript of Default Hearing), and such evidence was presented to the Court. They were not contrary to uncontroverted material in the file of the case. Trans World Airlines, Inc., v. Hughes, Supra.

The federal policy is of deciding cases on the basis of substantive rights rather than technicalities. Hines v. Wainwright, 539 F.2d 433, 434 (1976).

4. THE COMPLAINT WAS SUFFICIENT TO STATE A CLAIM UNDER 42 U.S.C. §1983.

As the Ninth Circuit stated, "Benny alleged that the guards deliberately stood aside while he was assaulted by other prisoners, and the Pipes struck him once. Because the guard's actions were intentional, not negligent, the guard's

argument must fail. Benny must be taken to have shown a violation of a substantive due process."

Thomas v. Booker, 784 F.2d 299, 303 (1986) states that "[P]rison officials may be liable where they are 'deliberately indifferent to [a prisoner's] constitutional rights, either because they actually intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates.' Martin v. White, 742 F.2d 469, 474 (1984) (quoting Branchcomb v. Brewer, 669 F.2d 1297, 1298 (1982)."

The court must be referred back to Reason 2 herein for denying the Writ, in which Daniels v. Williams, Supra and Davidson v. Cannon, Supra, are cited to the court. It is clear from these cases that the complaint filed by Respondent was sufficient to state a valid claim under 42 U.S.C. §1983 as required, and the Petitioners' zeal in trying to convince the court that the complaint filed by Respondent does not properly allege that Petitioner's intentional conduct damaged the Respondent, must fail.

5. RESPONDENT STATED A VALID EIGHTH AMENDMENT CLAIM IN HIS COMPLAINT.

The Ninth Circuit was correct in stating the Respondent's complaint "alternatively" stated a valid §1983 claim based on the Eighth Amendment.

In discussing the Eighth Amendment prohibition against cruel and unusual punishment Martin v. White, Supra states:

> "Subjecting prisoners to violent attacks or sexual assaults, or constant fear of such violence, shocks modern sensibilities and serves no legitimate penological purpose. (cite). We reject as below any level of decency the theory that sexual or other assaults are a legitimate part of a prisoner's punishment. Accordingly, we have concluded that prison officials may be liable where they are "deliberately indifferent to [a prisoner's] constitutional rights, either because they actually

intended to deprive him of some right, or because they acted with reckless disregard of his right to be free from violent attacks by fellow inmates." (Cites)

The complaint filed by Respondent alleged intentional behavior on behalf of the Petitioners, and Watts v. Laurent, 774 F.2d 168, 172 (1985) in determining the standards governing whether a defendant may be held liable for depriving a plaintiff of rights secured under the Eight Amendment, stated:

> "In Estelle v. Gamble, 429 U.S. 97, 97 S.Ct. 285, 50 L.Ed.2d 251 (1976), the Supreme Court held that deliberate indifference to prisoners' serious medical needs constitutes the unnecessary and wanton infliction of pain that is the hallmark of cruel and unusual punishment. Id. at 104, 97 S.Ct. at 291. Since that case, this court has repeatedly recognized that the failure of institutional personal to protect a prisoner from the assaults of other prisoners can also rise to the level of an eighth amendment violation. (cite). Nevertheless, conduct that simply amounts to "mere negligence or inadvertence" is insufficient to justify the imposition of liability. (cite). Rather, "[i]n order to infer callous indifference when an official fails to protect a prisoner from the risk of attack, there must be a 'strong likelihood' rather than a 'mere possibility' that violence will occur." (cites). "[A] guard does not have to believe to a moral certainty that one inmate intends to attack another at a given place at a time certain before that officer is obligated to take septs to prevent such an assault." (cites). The failure to protect a prisoner on even a single occasion can give rise to liability where it can be inferred that an institutional employee should have realized that there was a "strong likelihood" of an attack." (cite).

Also, Miller v. Solem, 728 F.2d. 1020, 1024 (1984) stated that "a prisoner has a 'clearly established' Eighth Amendment right to be reasonably protected from known dangers of attacks by fellow inmates" (cite).

It therefore follows, that the respondent, in his complaint, did state a valid §1983 claim based on the Eighth Amendment.

CONCLUSION

Respondent respectfully submits that his complaint in the district court stated a valid 42 U.S.C. §1983 claim, and that the district court entered a valid judgment against the Petitioners. Petitioners were defaulted and cannot now claim that the well pled allegations therein were frivolous and should not have been allowed. No susbtantial issue has been

raised requiring this Court to grant the Writ of Certiorari and Respondent respectfully requests that the Petition be denied.

DATED this 4th day of August, 1987.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, JAMES T. BIALAC, a member of the Bar of this Court, hereby certify that, on this 4th day of August, 1987, one copy of the Brief of Respondent in Opposition to Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit in the above-entitled case was mailed, first class postage prepaid, to Ronald J. Greenhalgh, Assistant Attorney General, 1275 West Washington, Phoenix, Arizona 85007, counsel for the Petitioners. I further certify that all parties required to be served have been served.

James T. Bialac

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NO. 86-2064

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DANNY PIPES AND CHARLES PAYNE,

Petitioners,

-v-

STEVE BENNY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

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NO. 86-2064

IN THE SUPREME COURT OF THE UNITED STATES
October Term, 1986

DANNY PIPES AND CHARLES PAYNE,

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-v-

STEVE BENNY,

Respondent.

On Petition for Writ of Certiorari
to the United States Court
of Appeals for the Ninth Circuit

PETITIONERS' REPLY MEMORANDUM

Respondent, in his opposing brief in No. 86-2064, argues that the petition "neglects to set forth considerations governing the issuance of an extraordinary writ" and "fails to establish any special and important reasons for granting the writ." Brief in Opp., p.1. In reply,

petitioners submit that their petition clearly reflects that they are seeking review of a judgment and opinion of the United States Court of Appeals for the Ninth Circuit. Consequently, the appropriate jurisdictional statute is 28 U.S.C. §1254 (1).[1/] Furthermore, their petition shows the decision below to be erroneous and in conflict with decisions of this Court and with decisions of several of the courts of appeals. Finally, their petition suggests that the issue presented is sufficiently important for this Court to review.

A resolution of this issue will have actual and practical benefits

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1/ Petitioners' reliance upon 28 U.S.C. §1254 (1) is obvious from the text of their petition and from the fact that they cited it in their Application for an Extension of Time. See App. A.

for innumerable litigants and for an over-burdened federal judiciary.[2/] A definitive decision from this Court excluding such trivial torts as those involved in this case from 42 U.S.C. §1983 coverage will promote a more effective federal judiciary. Federal courts have enough business of their own without handling state tort cases. State courts

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2/ Constitutional claims by prisoners are being presented to federal courts in ever incresing numbers; e.g., "18,856 [Bivens and §1983 prisoner] suits were filed in federal court in the year ending June 30, 1984, as compared to just 6,606 in 1975." Cleavinger v. Saxner, 106 S.Ct. 496, 506 (1985) (Rehnquist, J., dissenting), citing Administrative Office of the United States Courts, Annual Report of the Director 143, Table 24 (1984).

A computer search on LEXIS by petitioners' counsel disclosed that reference to 42 U.S.C. §1983 appeared in 60 reported cases of this Court and in 4280 reported cases of the courts of appeals and district courts during the two year period August 1, 1985 to July 31, 1987.

can and do provide adequate remedies for common law torts. Simple assault and battery does not violate the Constitution simply because the victim is a prisoner. But allowing such trivial torts to masquerade as constitutional violations diminishes the federal courts' capacity to deal with the more substantial matters within their jurisdiction. The time has come to realign case loads.

Next, respondent argues that the manner in which petitioners raised the Parratt argument in the court below precludes their raising it with this Court. Brief in Opp., p.3. The short answer to this contention is that regardless of whether the Parratt issue was properly raised below,[3/] it is an

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3/ See App. B.

issue of subject matter jurisdiction, and if petitioners are correct in asserting that the Parratt doctrine extends to minor deprivations of liberty like those in this case, then the district court lacked jurisdiction to entertain respondent's Complaint and that fact can be raised for the first time in this Court. See Bender v. Williamsport Area School Dist., ___ U.S.____, 106 S.Ct. 1326, 1331 (1986) and City of Kenosha v. Bruno, 412 U.S. 507, 511-513 (1973). See also Rule 12(h)(3), Fed.R.Civ.P.

Respondent also raises the argument that since petitioners were defaulted they "cannot now complain about the court's rulings." Brief in Opp., p.3. Petitioners concede that the allegations of the Complaint must be accepted as true because of the default. They assert, however,

that even when the allegations of the Complaint are accepted as true they still do not add up to make out a cognizable claim under 42 U.S.C. §1983 and that petitioners are entitled to demonstrate this insufficiency on appeal. See Thompson v. Wooster, 114 U.S. 104 (1885) and Danning v. Lavine, 572 F.2d 1386 (9th Cir. 1978). If the Complaint is deficient, as petitioners contend, then there can be no judgment, default or otherwise.

Finally, respondent argues that the Complaint is sufficient to state a claim under §1983 because it alleges both a violation of substantive due process and the Eighth Amendment. However, only the

Eighth Amendment argument is relevant.[4/] In support of his Eighth Amendment argument, respondent cites several cases in which the complained of conduct "shocks the conscience." In contrast, the only thing shocking about our case is that the Ninth Circuit could so cavalierly conclude that the commonplace, innocuous incidents of minor tortious conduct alleged in respondent's Complaint rise to the level of constitutional violations. No other court of appeals has elevated such trivial torts to constitutional status. The Ninth Circuit (and other courts of appeals)

4/ This Court made it clear in Whitley v. Albers, ____U.S.____, 106 S.Ct. 1078, 1088 (1986), that prisoners could not successfully sustain a claim for violation of substantive due process unless the complained of conduct was egregious enough to constitute a violation of the Eighth Amendment.

opinions cited in support of the decision in this case all involved much more brutal behavior.[5/] Indeed, simple assault and battery had previously been denied constitutional status by the Ninth Circuit.[6/] Its decision, in this case, that the Constitution is offended whenever prison guards stand by while one prisoner hits or kicks another is clearly erroneous.

5/ Gaut v. Sunn, 792 F.2d 874 (9th Cir. 1986); Meredith v. Arizona, 523 F.2d 481 (9th Cir. 1975); Johnson v. Glick, 481 F.2d 1028 (2d Cir. 1973), cert. denied, 414 U.S. 1033 (1973); Norris v. District of Columbia, 737 F.2d 1148 (D.C.Cir. 1984); and Rutherford v. City of Berkeley, 780 F.2d 1444 (9th Cir. 1986).

6/ "That the effect of our holding is to relegate appellant to his tort law remedy under Arizona law for Kush's alleged assault and battery should surprise no one." Rutledge v. Arizona Board of Regents, 660 F.2d 1345, 1352 (9th Cir. 1981), aff'd on other grounds sub nom. Kush v. Rutledge, 460 U.S. 719 (1983).

This Court cannot allow this wrong decision to stand.[7/] The federal courts are already being overwhelmed by too many §1983 cases of questionable merit. The Ninth Circuit's opinion in this case opens the federal courthouse door even wider. Entertaining trivial torts as purported §1983 claims puts unnecessary strain on the federal courts and on federal/state relations. Torts belong in state courts, not federal courts. State courts have now demonstrated that they are willing and able to decide these cases on either

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7/ Apparently the fact that this Court can review only about 1% of the decisions of the courts of appeals puts insufficient pressure on some panels of the Ninth Circuit to decide §1983 cases correctly. Unfortunately, the consistency with which the Ninth Circuit is reversed by this Court hasn't cooled its compulsion to decide cases on the outside of the outer bounds of §1983. This is one of those cases.

federal constitutional or state law grounds. For these reasons plenary review of the action below is needed. The petition should be granted.

Respectfully submitted,

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August 17, 1987

APPENDIX A

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

No._____

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1986

DANNY PIPES and CHARLES PAYNE, Petitioners,
v.

STEVE BENNY, Respondent.

APPLICATION FOR EXTENSION OF TIME TO FILE PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

To the Honorable Sandra Day O'Connor, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit.

Petitioners Danny Pipes and Charles Payne pray for a 30-day extension of time to file their petition for

certiorari in this Court to and including June 9, 1987. The Order of the United States Court of Appeals for the Ninth Circuit denying the Petition for Rehearing was filed on February 9, 1987, and petitioners' time to petition for certiorari in this Court expires May 11, 1987. This application is being filed more than 10 days before that date.

Copies of the judgment appealed from and the opinion below are attached hereto. The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

. . .

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APPENDIX B

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APPELLANTS' OPENING BRIEF
IN THE NINTH CIRCUIT

Plaintiff's complaint alleges separate incidents of wrongful conduct on the part of the defendants, i.e., an assault upon him by defendant Pipes and the failure of defendants Pipes and Payne to protect him from other prisoners. The assault is alleged in the complaint in these terms:

> One of the administrative segregation prisoners made a threatening gesture with his fist to hit Steve Benny and the fight was on. Steve Benny was holding his own until CSO Danny Pipes raised the iron panel crank that is used to open and clsoe [sic] the cell doors, and swung it at Steve Benny, which caused Steve Benny to back up in order to not be hit by the iron crank.
>
> CSO Danny Pipes held the iron bar above his head in a striking position towards Steve Benny's head while handcuffing him and used abusive force as he (Pipes) removed Steve Benny from the Able Run area. ER 4-5.

At best, plaintiff has alleged a cause of action for tort which could and should be brought in state court.[5/] Not every assault by a law enforcement officer constitutes a S 1983 violation. Bates v. Westervelt, 502 F.Supp. 94 (S.D.N.Y. 1980). See also Sampley v. Ruettgers, 704 F.2d 491 (10th Cir. 1983); Johnson v. Glock, 481 F.2d 1028, 1033 (2d Cir.

5/ See Ingraham v. Wright, 430 U.S. 561 (1977); Parratt v. Taylor, 451 U.S. 527 (1981); and Daniels v. Williams, 748 F.2d 229 (1984), cert. granted, 105 S.Ct. 1168 (1985).